United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 71-1084

JAMES L. PLEASANT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

R. Harrison Pledger, Jr.
Counsel for Appellant
(Appointed by this Court)

I N D E X

TABLE OF AUTHORITIES

Cases:

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*Cases principally relied upon by appellant

STATEMENT OF QUESTIONS PRESENTED

1. Whether the unrestrained examination of appellant's personal effects during the booking procedure following his arrest, exceeded the Constitutionally permissible scope of a warrantless search.

2. Whether the trial court erred in refusing appellant's requested instruction on simple assault as a lesser included offense.

This case has not previously been before this court.

STATEMENT OF THE CASE

This is an appeal from a judgment entered on convictions of armed robbery and assault with a dangerous weapon resulting in a sentencing of appellant to imprisonment for concurrent terms of two to seven years on each offense.

On February 2, 1970, at approximately 5:15 p.m., Metropolitan Police officers Alfred Mayo and Jeffery C. Davis responded to a radio run for subjects taking narcotics in an automobile in the 4200-4300 block of Ninth Street, N. W. [Tr. 4, 34]. Upon learning from an unidentified citizen on the street that the car was in the next block [Tr. 5, 35, 39], the officers approached the automobile at a high rate of speed, stopped parallel to the automobile, jumped out [Tr. 11, 93, 111], and observed appellant and his companion, Dion Watts, with tourniquets around their arms, a needle in Mr. Watts' hand [Tr. 6, 11, 39] and blood on appellant's hand [Tr. 33, 39]. When appellant opened his door and started to arise, the officers testified that they observed a gun on the seat under appellant's leg [Tr. 7, 31, 94, 113]. Appellant denied having a gun in his possession and said that the gun was removed from under the front seat [Tr. 45, 128].

An additional gun, a .22 caliber pistol, was found in a greenish-blue jacket in the rear seat of the automobile behind the driver, Dion Watts [Tr. 12, 15, 40]. When questioned at the scene about this jacket, Mr. Watts denied that it belonged to him [Tr. 12-15, 40]. According to Officer Mayo's testimony, Mr. Watts stated "that it wasn't his coat, it was the other gentleman's [a third person] coat that got out of the car or something." [Tr. 20, 21].

Appellant likewise testified that the jacket and gun belonged to a friend of Dion Watts, named George, who had just alighted from the automobile and gone into a store [Tr. 46, 47, 133-4].

The officers also testified that their subsequent search at the precinct of appellant's person produced $163 and the wallet of Mr. John Francis Horgan, identified as such from Mr. Horgan's Maryland Operator's Permit found in the wallet [Tr. 10, 96].

It is not clear from the officers' testimony at what point Mr. Horgan's wallet was found. According to Officer Davis, the wallet was found in appellant's rear pocket at the scene [Tr. 41, 42, 44]. Yet, according to Officer Mayo, only a superficial frisk for weapons was conducted at the scene. Subsequently, at the precinct station a detailed search was conducted followed by an itemization in the property book [Tr. 24, 27, 96, 100].

Appellant testified that at the scene the officers recovered $162 in cash from his front pocket and only one wallet - his personal wallet [Tr. 129, 130]. Appellant further testified that he was carrying the coat in the precinct house and put it on a chair next to his own and when instructed by the police to empty his pockets and place the belongings on the desk, he removed all items in both jackets, including Mr. Horgan's wallet which was in George's jacket [Tr. 135, 161].

Subsequently, the jacket was taken from the Sixth Precinct by Mr. Watt's mother [Tr. 21] when she came to the station to claim Mr. Watt's automobile.

Mr. Horgan had been the victim of a robbery in January 1970. Regarding that crime he testified that at noon on January 21, while in his truck outside a restaurant at New Jersey and O Street, N. W., a man got into his truck, pointed a gun at him and demanded his money [Tr. 49-50, 73-74]. In response, Mr. Horgan turned over $65 in cash, his wallet, and a few checks [Tr. 50, 75]. Simultaneously, another man came to the opposite side of the truck, opened the door, and told Mr. Horgan to look straight ahead while he proceeded to search through his pockets [Tr. 50, 53, 74]. Some four or five minutes later both men told Mr. Horgan to drive around the corner and immediate they ran off [Tr. 54, 76]. The description given to the police by Mr. Horgan indicated that his assailant was between five feet ten inches and six feet tall, was of thin build, and was wearing a green jacket [Tr. 55-6, 77, 80].

On February 4, 1970, Mr. Horgan was shown a series of nine photographs by Detective Litner and picked out a photograph of appellant as being the man who had robbed him on January 21, 1970 [Tr. 51-2, 77, 83], and on February 5, 1970, he identified appellant at a line-up [Tr. 52, 53, 78].

At trial, appellant denied owning a green jacket [Tr. 136], claimed that he wore a beard throughout the month of January 1970 [Tr. 139] and detailed that Mr. Horgan's wallet was recovered at the Sixth Precinct from the jacket found in the rear of the automobile belonging to George [Tr. 135].

In support of his alibi defense, appellant testified that on the day of the robbery, January 21, 1970, he was either at home or had gone to take his son to school [Tr. 152], it being his custom to sleep late, stay around the house and watch television, and occasionally walk his son to school [Tr. 142, 151]. In any event, he denied being on New Jersey Avenue [Tr. 149].

Appellant's wife confirmed that this was his habit [Tr. 166-9] and that although appellant was unemployed on February 2, 1970, he did gamble [Tr. 171].

The trial judge instructed on the defense of alibi, armed robbery, robbery, and assault with a dangerous weapon. Defense counsel's request for an insturction on simple assault was denied [Tr. 206].

SUMMARY OF ARGUMENT

The unrestrained examination of appellant's personal effects during the booking procedure following his arrest exceeded the Constitutionally permissible scope of a warrantless search incident to arrest and, therefore, violated appellant's Fourth Amendment rights. Accordingly, it was plain error for the trial court to admit the wallet and identification of appellant into evidence.

Furthermore, the trial court's refusal to instruct the jury on simple assault was erroneous in view of the conflict in evidence on the issue of the dangerous weapon used during the robbery, and in view of

the fact that the jury could reasonably have inferred from the evidence that appellant was guilty of simple assault.

ARGUMENT

I

The police officers' examination at the precinct station of appellant's personal effects exceeded the Constitutionally permissible scope of a warrantless search incident to arrest and was, therefore, violative of appellant's Fourth Amendment rights.

Incidental to an arrest it is standard booking procedure in the District of Columbia to have the accused place all his nonessential effects in a container after they have been logged in the property return.*

Reasonable as that search may be, the unrestrained examination of personal effects beyond the point when their potential danger or identification has been ascertained is not within the permissible scope of a warrantless search incident to arrest.

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*District of Columbia Police Regulations, CH VI, §3 (1948)

> "Before being placed in confinement, prisoners shall be thoroughly searched and...billfolds and contents... shall be taken from them...A record of all property shall be made...."

As recognized by the Supreme Court in Terry v. Ohio, 392 US 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." The officers testified that the wallet was recovered from the appellant's rear pocket. It was not necessary to examine it for proper identification and once that wallet was viewed by police, it should have been immediately entered on the property return and placed in the appropriate container. Rifling through the wallet was not necessary to carry out this procedure. Nor can it be persuasively argued that a leather wallet presents such a potential danger to life that it must be thoroughly examined prior to being recorded in the property return. Absent a warrant or probable cause to believe the wallet was dangerous, the thorough search of that wallet lacked the "reasonableness" which the principles of the Fourth Amendment require.

As the police had lawful possession of the wallet, there is no reason why they could not have sought a search warrant if they felt they had some other valid reason to examine it more closely. The Fourth Amendment requirement for search warrants must be strictly construed.

> "
> "We are not dealing here with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." McDonald v. United States, 335 US 451, 455-6, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

In Peters v. New York, 392 US 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), the Supreme Court upheld a warrantless search incident to arrest emphasizing that the arresting officer "did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons." 392 US at 67. The search went beyond that limitation in the present case.

The "fruit of the poisonous tree" doctrine commands that as the wallet was illegally acquired not only should it not be used in court but all evidence obtained as a result thereof should have been excluded. Silverthorne Lumber Co. v. United States, 251 US 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). Appellant's conviction cannot stand in face of the plain error of admitting the wallet and the identification by Mr. Horgan of appellant, into evidence without evidence of an independent source.

II

The trial judge's failure to instruct the jury on simple assault was erroneous.

"The decision to grant or to refuse an instruction on a lesser included offense turns on the state of the evidence." United States v.

Comer, 137 US App. D.C. 214, 421 F.2d 1149 (1970). As stated in Sansone v. United States, 380 US 343, 85 S.Ct. 1004, 13 L.Ed. 882 (1965).

> "...A lesser included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser - included offense." Id. at 349.

In the present case, the element required for the requested charge on simple assault was the presence or absence of a dangerous weapon. Under the two phase analysis set forth in Comer, supra, "The court must first decide whether there is any conflict in the evidence that has been introduced insofar as it bears upon that element." The record clearly reflects a dispute on the issue of whether appellant assaulted Mr. Horgan with a dangerous weapon.

Although Mr. Horgan testified that it was appellant who pointed a gun at him in the cab of his truck, he likewise testified that there were two assailants and that the one who stood outside the truck searched his pockets. There was no testimony that he had a gun. He saw both men through his rear-view mirror as they fled [Tr. 51]. Not only did appellant deny being on New Jersey Avenue on the date of the robbery [Tr. 149-151], he further denied having a gun in his possession at the time he was arrested. [Tr. 45].

The jury, therefore, could have believed that the victim mistakenly identified appellant as being in the cab of the truck and believed instead

that appellant was the assailant who stood outside the victim's truck without a gun and searched Mr. Horgan's pockets, that is, committed a simple assault.

> "The jury is not confied in its findings to matters that are directly set forth in testimony but may base an inference of lesser offense on a "reconstruction that is fairly inferable' from the evidence, gleaned perhaps by putting together some items from one witness, some from another, and some from the jury's own experience, and sense of probabilities." United States v. Huff [US App. D.C., No. 22,793, March 8, 1971] quoting Belton v. United States, 127 US App. D.C. 201, 382 F.2d 150 (1967).

Even if the court should find that such an inference is not based upon a dispute on the element of the dangerous weapon, the inference is nonetheless consonant with the second stage analysis presented in Comer, supra, where it is stated that:

> "Even if the trial court finds that the facts bearing upon the element required for the greater offense but not for the lesser are not in dispute and that no evidence introduced explicitly tends to negative a finding of the element in question, the inquiry is not at an end. Rather, the court must appraise all the testimony and evidence to determine whether it is capable of more than one reasonable inference." [at 1154].

Clearly, the jury should have been afforded the opportunity to find appellant guilty of the lesser included offense of simple assault.

> "The evidence of a simple assault cannot be regarded as strong or convincing and perhaps the source could well be regarded as of dubious reliability, but the questions of its weight and credibility was for the jury." Young v. United States, 114 US App. D.C. 42, 309 F.2d 662, 663 (1962).

CONCLUSION

As appellant's conviction was based on evidence improperly seized in violation of his Fourth Amendment rights and, therefore, improperly admitted into evidence, appellant's conviction should be reversed.

Alternatively, appellant should be granted a new trial with a jury properly instructed on the charge of simple assault.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

v.

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a three-count indictment filed on March 31, 1970, with assault with a dangerous weapon, robbery, and armed robbery, in violation of 22 D.C. Code §§ 502, 2901 and 3202, respectively. His case was tried before Judge June L. Green and a jury on August 18 and 19, 1970. He was found guilty of armed robbery and assault with a dangerous weapon. On January 18, 1971, appellant was sentenced by Judge Green to concurrent terms of two to seven years for both offenses, to be effective at the expiration of any sentence then being served. This appeal followed.

Mr. John Horgan, a truck driver for a Washington beer distributor, testified that on January 21, 1970, at about 12:00 noon, he parked his truck at the corner of New Jersey Avenue and O Street, Northwest. He went up to a nearby restaurant, found it was closed, and returned to his truck. As he got back into the cab, appellant appeared and climbed in on the passenger's side. He pointed a pistol at Mr. Horgan and announced, "O.K. let's have the money." Mr. Horgan handed over his wallet containing about $65 in cash and various cards, including his driver's license, to appellant. At the same time a second man had mounted the running board on the driver's side of the cab and was rummaging through Mr. Horgan's pockets. After appellant got out of the cab, he commanded Mr. Horgan to drive away. Horgan complied by driving around the corner. He called the police, but appellant and his partner made good their escape. (Tr. 69-79)

Mr. Horgan testified that he had observed appellant in the cab with him for about a minute or two, at a distance of one or two feet.[1] He identified appellant in court, and he also told the jury on direct examination that he had picked appellant's picture out from a group of nine photographs shown to him by the police on February 4, 1970, and that on the same night he had picked appellant out of a lineup.[2] He identified Government's exhibit No. 3 as the wallet taken from him by appellant, noticing that it contained his driver's license, credit cards and a picture of his wife. Mr. Horgan stated that Government exhibit No. 4, a pistol, "looks like" the gun he was held up with (Tr. 69, 73-79, 81).

The pistol and the wallet were tied into Mr. Horgan's testimony by Officers Alfred Mayo and Jeffrey Davis of

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[1] Appellant was described by Mr. Horgan as in his early twenties, 5'10" to 6' tall, with a thin beard, and wearing a green Army fatigue-type jacket (Tr. 77, 84). He was not able to see or describe the second man because he was turned away from him, facing appellant, during the robbery (Tr. 75).

[2] A photograph of the lineup was received in evidence as Government's exhibit No. 2.

the Metropolitan Police. On February 2, 1970, twelve days after Mr. Horgan was robbed, these officers approached a car parked on upper 9th Street, Northwest, in which appellant and one Dion Watts were seated.[3] As Officer Mayo approached the passenger's side of the car, appellant attempted to get out. At this point the officer saw a pistol on the seat at the place where appellant had been sitting. He seized the pistol, placed appellant under arrest and frisked him.

Appellant was fully searched sometime later at the precinct. A wallet containing Mr. Horgan's driver's permit was taken at this time from appellant's rear pants pocket by Officer Mayo. Appellant had about $163 on his person when arrested. Officer Mayo identified Government's Exhibit No. 4 as the pistol he seized from the seat, and Government's exhibit No. 3 (Mr. Horgan's wallet) as the wallet he seized from appellant at the precinct (Tr. 92-98, 100, 123). Officer Davis, who had arrested Watts, also identified the pistol as the one taken from the seat and stated that the wallet had been taken from appellant's rear pocket by Officer Mayo[4] (Tr. 111-114).

Appellant testified in his own behalf. He denied being at the scene of the robbery on January 21, but he could not state definitely where he was at the time. He might

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[3] The government did not bring out before the jury the reason why the officers approached the car. This reason was explained by the officers in their testimony during a hearing on pretrial motions. They had received a radio run for subjects taking narcotics in an automobile in the 4200 block of Ninth Street, Northwest. As they approached that area, an unidentified citizen flagged them down and pointed to the car occupied by appellant and Dion Watts, parked about a block away. As the officers alighted from their vehicle and approached this car, they saw both men in the process of injecting narcotics into their arms. Both men were apparently arrested then for possession of narcotics paraphernalia (22 D.C. Code § 3601) (Tr. 4-10, 32-36, 38-40).

[4] On cross and redirect examination Officer Davis stated that he could not be positive that Officer Mayo had taken the wallet from appellant's pants at the precinct rather than at the scene of the arrest (Tr. 114-117; see also Tr. 43-44).

have been home, he said, or he might have been ushering his child to and from school; but he could not remember for certain (Tr. 141-143, 149-154). Regarding the events on the day he was arrested, appellant claimed that Officer Mayo found the gun under the front seat, not on top of it. Then, according to him, he was searched on the scene, and his own wallet was removed by the officer at that time. Mr. Horgan's wallet, claimed appellant, was picked up by him at the precinct out of a coat which had been lying in the back seat of the car, and was in his hands when the officers took all property in his possession for safekeeping.[5] He denied that it was ever in his pocket. The wallet taken from his pocket, he asserted, was his own, though it looked "just like" Mr. Horgan's. (Tr. 128-136, 153, 160-161.) The coat, he went on, belonged to a man named "George" who had left the car shortly after the police arrived (Tr. 132-134). He also testified on direct examination that he was wearing a beard on the day of his arrest on February 2 but that he shaved it off before the lineup held on February 5 (Tr. 140-141).[6] Testifying in rebuttal, Officer Mayo stated once more that, according to the police property return form, Mr. Horgan's wallet was seized from appellant's pocket. He also testified that the coat out of which appellant claimed he pulled the wallet was never in his possession at the precinct (Tr. 179-181). He also denied that any other wallet was taken from appellant (see Tr. 183-184).

At the conclusion of the court's charge, defense counsel's request for a simple assault instruction under the assault with a dangerous weapon count, made then for the first time, was noted and denied (Tr. 205-206).

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[5] Appellant was booked and then jailed that night, and released from custody after arraignment the following day.

[6] Appellant's wife corroborated the fact that he removed his beard shortly before the lineup (Tr. 171-172). She was unable to say, however, whether he was at home with her during the critical hours on January 21 when the robbery occurred (Tr. 166-174).

ARGUMENT

The examination by the police of a wallet seized from appellant after he was validly arrested was reasonable.

(Tr. 3-59, 96-97, 100-101, 123)

Appellant was brought to the precinct by the officers after having been arrested for carrying a dangerous weapon[7] and possession of the implements of crime, *i.e.*, narcotics paraphernalia.[8] At that time, according to Officer Mayo, appellant was "booked" for these charges and Mayo searched him completely. Seized from a rear pants pocket was a wallet. Officer Mayo opened it and determined, from a driver's permit and other cards he found inside, that it belonged to Mr. Horgan, who he later determined was the victim of the robbery on January 21. He also observed that the wallet contained about $163 in cash (Tr. 96-97, 100-101, 123). This information, of course, led to appellant's conviction for robbery from which he is appealing in the instant case. His principal contention on this appeal is that the police, though concededly authorized to take the wallet from him, transgressed the Fourth Amendment when they opened it and examined its contents.

In the first place, we see no need for this Court to pass on the question. The failure of appellant in the trial court to object to the introduction of the wallet or evidence derived from opening it—either by an objection at trial or by a motion to suppress before trial—forecloses him now from raising the issue on appeal. Rule 41 (e), FED. R. CRIM. P.; *Segurola* v. *United States*, 275 U.S. 106 (1927); *United States* v. *White*, 139 U.S. App. D.C. 32, 429 F.2d 711 (1970); *Bailey* v. *United States*, 131 U.S.

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[7] *See* 22 D.C. Code § 3204.

[8] *See* 22 D.C. Code § 3601; *McKoy* v. *United States*, 263 A.2d 645 (D.C. Ct. App. 1970) [*McKoy I*]; *McKoy* v. *United States*, 263 A.2d 649 (D.C. Ct. App. 1970) [*McKoy II*]. Appellant was eventually tried in the Court of General Sessions and convicted of both offenses. *See* D.C. Ct. Gen. Sess. Criminal Case No. 4432-70.

App. D.C. 314, 404 F.2d 1291 (1968); *Sandez* v. *United States*, 239 F.2d 239 (9th Cir. 1956). We find no indication on this record that such police behavior could be construed to be so violative of appellant's Fourth Amendment rights that this Court should rule on it as a matter of plain error. *See Smith* v. *United States*, 118 U.S. App. D.C. 235, 335 F.2d 270 (1964). Appellant did file and litigate two pretrial motions to suppress. However, these unsuccessful efforts were directed at testing the probable cause for his arrest and the fairness of the pretrial identification process and not the scope of the search of the wallet seized from him (Tr. 3-59). Neither motion focused on the examination of the wallet by the police after appellant's arrest; they may not be viewed now as objections to that procedure. *United States* v. *Weldon*, 384 F. 2d 772 (2d Cir. 1967); *cf. United States* v. *Wilson*, —— U.S. App. D.C. ——, 435 F.2d 403 (1970).

Passing to the merits, we do not in any event think that the mere opening and examination of a validly seized wallet under these circumstances is unreasonable. At the outset we note that the validity of the "search" in this case is not governed, or limited, by considerations of the arresting officer's safety. *Compare Chimel* v. *California*, 395 U.S. 752, 763 (1970); *Terry* v. *Ohio*, 392 U.S. 1, 23-27 (1968). The wallet had already been taken from appellant and was in the process of being entered on the property book when the contents were examined.

The touchstone of judgments based on the Fourth Amendment is reasonableness. We think that police examination of a wallet seized from a validly arrested individual who is to be detained in jail falls well within the bounds of reasonableness. There are several justifications for such an inspection. First, it falls within the ambit of the inherent power of the police to search thoroughly a person whom they have validly taken into custody. We submit that the effects found on such a person may be searched, at least to the extent that a visual inspection of their contents may be made. *See United States* v.

Frankenberry, 387 F.2d 337 (2d Cir. 1967); *Malone* v. *Crouse*, 380 F.2d 741, 744 (10th Cir. 1967); *Charles* v. *United States*, 278 F.2d 386, 389 n.2 (9th Cir. 1960); *Muhammad* v. *Mancusi*, 301 F. Supp. 1100 (S.D.N.Y. 1969). Second, the examination of the wallet is reasonable as part of the obligation of the police to ascertain the arrestee's identity. *Cf. Vauss* v. *United States*, 125 U.S. App. D.C. 228, 370 F.2d 250 (1966); *Cotton* v. *United States*, 371 F.2d 385 (5th Cir. 1967); *see also United States* v. *Frankenberry*, *supra*. The record is unclear whether appellant had ever given the arresting officer any identification. But whether or not the police had a tentative identification, supplied by appellant or his co-arrestee, we find no Fourth Amendment violation in their looking through the wallet found on appellant, which is the logical place to look, in order to determine whom they had in custody. We submit that all concerned—the arrestee, his family, and the police—are served if his true identity is fairly ascertained by the arresting authorities.

Third, this intrusion is validated by the duty imposed upon the police to protect the arrestee's property and to make a record of all property taken.[9] Correlative to this is their own interest in protecting themselves from civil suits. *See United States* v. *Robbins*, 424 F.2d 57 (6th Cir. 1970); *United States* v. *Fuller*, 277 F. Supp. 97 (D.D.C. 1967), *vacated on other grounds*, —— U.S. App. D.C. ——, 433 F.2d 533 (1970). It would flow logically from these requirements that the police must be permitted to make an examination of seized items at least sufficient to determine whose they are. In the particular case of a wallet, the only means to accomplish this is simply to open it, as the police did here. Moreover, any wallet may be assumed to contain at least some money, and no policeman could make an accurate accounting of an arrestee's property without looking inside his wallet and ascertaining what money is there.

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[9] *See* MANUAL OF THE METROPOLITAN POLICE DEPARTMENT, ch. VI, § 3 (1967).

Lastly, the search here was reasonable under the principle that the police may search a person and his effects for fruits, instrumentalities, and evidence of the crime for which he was arrested. *Naples* v. *United States*, 113 U.S. App. D.C 281, 283, 307 F.2d 618, 620 (1962); *see Draper* v. *United States*, 358 U.S. 307 (1959); *United States* v. *Robbins*, *supra*; *Muhammad* v. *Mancusi*, *supra*. The wallet in appellant's pocket might very possibly have contained ammunition for the pistol, other narcotics paraphernalia (especially a needle and syringe), or narcotics themselves. The police, duty-bound to investigate criminal activity, would have been remiss had they not opened the wallet under these circumstances.[10]

For all these reasons we conclude that the slight intrusion into the wallet was patently necessary and reasonable.[11]

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[10] In passing, it should be pointed out that the present case is materially different from *United States* v. *Alston*, 311 F. Supp. 296 (D.D.C. 1970), in which the Court suppressed evidence derived from an inspection of Alston's wallet at the precinct. The crucial factor in the court's decision was not that the police searched the wallet, but that they did so during a period when Alston was illegally detained. He had already paid the collateral for the offense of disorderly conduct and should have been permitted to leave. Absent this illegal detention, the Court in *Alston*, we feel, would have sustained the examination of the wallet.

[11] There was no error in the refusal of the trial judge to charge on simple assault as a lesser included offense under the assault with a dangerous weapon count. A lesser included offense instruction is proper only when, in order to convict of the greater offense, the jury must find a disputed factual element which is not required for the lesser offense. *Sansone* v. *United States*, 380 U.S. 343, 349-350 (1965). Appellant claims that the record reflects a dispute on the issue of whether he assaulted Mr. Horgan *with a dangerous weapon* because, given his attempted alibi defense, the jury could have believed that the other man who robbed Mr. Horgan, not appellant, held the gun. The apparent defect in this theory is that the attempted alibi defense did not specifically contest the issue of whether appellant held a gun; it sought to controvert each and every element of the charge of assault with a dangerous weapon. If the jury had accepted his defense, their only rational course would have been to acquit him entirely. *United States* v. *Sinclair*, D.C. Cir. No. 23,178, decided March 31, 1971. Moreover,

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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there was no conflict on the issue in the government's evidence. Mr. Horgan repeatedly testified that appellant was the man who pointed the pistol at him (Tr. 73-74, 79). No evidence appeared which would rationally permit an acquittal of assault with a dangerous weapon and conviction of simple assault. *United States* v. *Sinclair*, *supra*; *United States* v. *Comer*, 137 U.S. App. D.C. 214, 219, 421 F.2d 1149, 1154 (1970); *Burcham* v. *United States*, 82 U.S. App. D.C. 283, 163 F.2d 761 (1947).

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